WISCONSIN SUPREME COURT
CALENDAR AND CASE SYNOPSES
APRIL 2022

The cases listed below will be heard in the Supreme Court Hearing Room, 231 East, State Capitol. The cases originated in the following counties:

Dane
Milwaukee
Ozaukee
Waukesha

TUESDAY, APRIL 5, 2022

9:45 a.m.	2019AP1046-CR	State v. Theophilous Ruffin
10:45 a.m.	20AP485	Wisconsin Property Tax Consultants, Inc. v. DOR

WEDNESDAY, APRIL 6, 2022

9:45 a.m.	19AP1007	Container Life Cycle Management, LLC v. DNR
10:45 a.m.	20AP307	Gregory M. Backus v. Waukesha County

THURSDAY, APRIL 7, 2022

8:30 a.m.	19AP2095	Great Lakes Excavating, Inc. v. Dollar Tree Stores, Inc.

TUESDAY, APRIL 12, 2022

8:30 a.m.	20AP1032	John Doe 1 v. Madison Metro School District
10:45 a.m.	21AP463	Colectivo Coffee Roasters, Inc. v. Society Insurance

WEDNESDAY, APRIL 13, 2022

8:30 a.m.	22AP91	Richard Teigen v. Wisconsin Elections Commission

Note: The Supreme Court calendar may change between the time you receive it and when a case is heard. It is suggested that you confirm the time and date of any case you are interested in by calling the Clerk of the Supreme Court at (608) 266-1880. If your news organization is interested in providing any type of camera coverage of Supreme Court oral argument, you must contact media coordinator Logan Rude at WISC-TV, (608) 271-4321. The synopses provided are not complete analyses of the issues presented.

WISCONSIN SUPREME COURT
April 5, 2022
9:45 a.m.

2019AP1046-CR State v. Theophilous Ruffin

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), affirming in part, reversing in part, and remanding the Milwaukee County Circuit Court order, Judge M. Joseph Donald presiding, denying Ruffin's motion for postconviction relief.

Theophilous Ruffin was convicted, following a jury trial, of second-degree sexual assault and acquitted of mayhem following a violent altercation with his pregnant girlfriend.

One night, Ruffin's girlfriend, V.P., who was pregnant with Ruffin's child, had stayed up late drinking and using cocaine. Later that night, the couple were in bed together when the couple's other child began crying. Ruffin and his girlfriend argued about who should feed their crying baby. The dispute escalated and became violent. The criminal complaint alleged that Ruffin punched V.P. in the head, threw her on the bed, pinned her there, and then assaulted her, causing serious physical injury by ripping off a part of V.P.'s flesh, which required 28 stitches to reattach. However, Ruffin's version was that V.P. was angry with him when he threatened to call social services about her drug use while pregnant, and that she lashed out at him. Ruffin claims he pushed on her legs to move her off of him and accidentally caused the injury. The State charged Ruffin with second-degree sexual assault by sexual intercourse causing injury, and with mayhem.

At trial, the State requested the criminal jury instruction, Wis. JI-Criminal 1208, setting forth the elements of second-degree sexual assault, sexual intercourse without consent by "use or threat of force or violence." The correct instruction would have been Wis. JI-Criminal 1209, which sets forth the elements of second-degree sexual assault, sexual intercourse without consent causing injury, illness, disease, or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care. Ruffin's counsel had originally requested a self-defense jury instruction, but later withdrew the request. It is not disputed that the State initially requested the wrong jury instruction and that no one caught the error nor objected until after the jury reached its verdict.

Before sentencing, counsel and the court discovered that the jury had been given the wrong sexual assault jury instruction. The State argued that it was harmless error. Ruffin disagreed, arguing that his entire defense was built around V.P.'s injuries being accidentally caused, and not caused by the use or threat of force or violence. The circuit court agreed with the State that the error was harmless. Ruffin was sentenced to 12 years of imprisonment, consisting of 8 years of initial confinement and 4 years of extended supervision.

Ruffin filed a postconviction motion with the trial court alleging ineffective assistance of counsel relating to the erroneous sexual assault jury instruction. The trial court denied the motion, without a hearing.

Ruffin appealed. He argued that he was entitled to a new trial on the grounds of trial court error, ineffective assistance of trial counsel, and in the interest of justice. The Court of Appeals rejected all of Ruffin's challenges, with one exception. The Court of Appeals reversed the trial court's denial of Ruffin's postconviction motion on the basis that his trial counsel was ineffective for withdrawing a request for a jury instruction on self defense and remanded this issue to the trial court to conduct a hearing.

The State filed a petition for review, raising one issue:

1. Was Ruffin entitled to an evidentiary hearing based on his postconviction allegation that his trial counsel was deficient for not pursuing a theory of self-defense?

Ruffin also filed a petition for reviewing, raising three issues:

1. Was his trial counsel deficient for failing to make a contemporaneous objection to the incorrect jury instruction, and if so, did the error prejudice Mr. Ruffin?
2. Did the circuit court erroneously exercise its discretion when it declined to provide the affirmative defense of "accident," to the instruction for second-degree sexual assault, intercourse without consent causing injury, contrary to Wis. Stat. § 940.225?
3. Do the several errors in the trial of Mr. Ruffin warrant the grant of a new trial in the interest of justice?

WISCONSIN SUPREME COURT
April 5, 2022
10:45 a.m.

2020AP485 Wisconsin Property Tax Consultants Inc. v. DOR

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), affirming the Ozaukee County Circuit Court order, Judge Sandy A. Williams presiding, dismissing the Wisconsin Property Tax Consultants and Wisconsin Manufacturers and Commerce's declaratory judgment action against the Wisconsin Department of Revenue and deferring to the Tax Appeals Commission.

Wisconsin Property Tax Consultants, Inc. (WPTC) and Wisconsin Manufacturers and Commerce, Inc. (WMC) seek review of a decision of the Court of Appeals that affirmed a circuit court decision dismissing WPTC and WMC's declaratory judgment action against the Wisconsin Department of Revenue (DOR) regarding the scope of a new property tax exemption for machinery.

In 2017, the legislature enacted a new personal property tax exemption for "machinery, tools, and patterns." Wis. Stat. § 70.111(27). In early 2018, WMC sent a letter to DOR expressing its interpretation of § 70.111(27), providing DOR with a hypothetical fact situation, and asking DOR to provide its interpretation of the statute in light of the hypothetical facts. DOR's answer to WMC did not align with WMC's interpretation of the statute. WMC filed a declaratory judgment action in circuit court, seeking a declaration that (1) DOR's interpretation and application of the statute is an unpromulgated administrative rule in violation of statutory rulemaking procedures; (2) DOR's administration of § 70.111(27) conflicts with state law; and (3) DOR's interpretation violates "uniformity, due process, equal protection, and the prohibition against government taking of private property without just compensation" under both the United States and Wisconsin Constitutions.

In a written decision, the circuit court dismissed the case, explaining that under the primary jurisdiction doctrine, "where an administrative remedy is provided by statute, relief should first be sought from the administrative agency before bringing it to the court." Under the primary jurisdiction doctrine, the court chose not to assume jurisdiction, deferring to the review and expertise of the Wisconsin Tax Appeals Commission. WMC and WPTC appealed the circuit court's dismissal, arguing that the primary jurisdiction doctrine cannot apply because the Tax Appeals Commission has no jurisdiction to consider their constitutional and rulemaking claims.

The Court of Appeals was not persuaded and affirmed the circuit court's decision. The Court of Appeals concluded that although courts give no deference to an agency's conclusion on matters of law, courts still follow the legislature's statutory mandate of administrative review. The Court of Appeals said the legislature has declared that the Tax Appeals Commission is "the final authority for the hearing and determination of all questions of law and fact arising under" the tax code, subject to judicial review; that taxpayers who dispute a tax assessment must bring their complaints to the Tax Appeals Commission; and that any aggrieved party may seek judicial review of a determination by the Tax Appeals Commission in circuit court.

WPTC and WMC filed a petition for review, raising one issue:

> In concluding that the Tax Appeals Commission had jurisdiction to entertain WPTC and WMC's declaratory judgment action asserting the DOR failed to comply with the rule promulgation requirements of Chapter 277 when it denied the exemption enacting in Wis. Stat. § 70.111(27) to all manufacturers, did the

circuit court improperly rely on the primary jurisdiction doctrine to dismiss WPTC and WMC's declaratory judgment action under Wis. Stat. § 227.40?

WISCONSIN SUPREME COURT
April 6, 2022
9:45 a.m.

2019AP1007 Container Life Cycle Management, LLC v. DNR

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), affirming the Milwaukee County Circuit Court order, Judge Stephanie Rothstein presiding, dismissing Container Life Cycle Management's petition for judicial review of two letters issued by the Wisconsin Department of Natural Resources.

In 2017, the Department of Natural Resources (DNR) and the United States Environmental Protection Agency notified Container Life Cycle Management, LLC (CLCM) of a violation of its air emissions permit due to odors and the emission of volatile organic compounds at the St. Francis, Wisconsin facility. CLCM submitted a permit application on February 14, 2018, to install a TRITON-60.95 Regenerative Thermal Oxidizer that would control the odors and emission of volatile organic compounds. The DNR advised CLCM that it needed to submit more information in order to complete the application. CLCM submitted a revised permit application on June 7, 2018, with additions to the application, including the installation of a new emissions source, removal of existing equipment, and a request to revise the existing permit emission limits.

In a letter dated June 26, 2018, the DNR denied a waiver to CLCM to begin construction on one of the additional projects included in the Thermal Oxidizer application because the DNR concluded that the facility was a PSD ("prevention of significant deterioration" of air quality) major source and that the DNR may not grant a waiver for such sources. The DNR said it had "reviewed the revised application and finds the application as submitted to be incomplete." The DNR listed several items still needed from CLCM to complete the Thermal Oxidizer application, now that the facility was considered a major PSD source. The DNR's letter concluded with a section titled "Notice of Appeal Rights", which notified CLCM of the time limits to appeal under Wisconsin Statutes. After receiving this letter, CLCM submitted additional information to the DNR contesting the PSD major source designation, but did not seek judicial review.

Further discussions between CLCM and the DNR about the PSD major source designation ended with the DNR issuing two letters to CLCM in December 2018. The first, dated December 14, 2018, said the DNR continued to find the application incomplete and again asked that CLCM submit the information requested in the DNR's June 26, 2018 letter—that the St. Francis facility required an after-the-fact PSD permit to address emissions not previously disclosed to the DNR. The DNR also explained why it considered the facility to be a PSD major source and why that designation remain unchanged from the June 26 letter. The DNR's letter concluded with a section titled, "Request for Additional Information," which requested again the information needed from CLCM to resolve its Thermal Oxidizer application, and that the letter was not a complete review of the Thermal Oxidizer construction permit or the operation permit application.

CLCM asked for another meeting with the DNR after receiving December 14 letter. The DNR believed another meeting would be fruitless and responded with its second letter, dated December 26, 2018. The second letter stated that the DNR had consistently indicated since June of 2018 that there was reason to believe the facility should have been permitted as a PSD major source since at least 2014. The December 26 letter again asked CLCM to submit information requested in both the June and December

14 letters and that the information requested is necessary to keep the permitting process moving forward. Neither the December 14 letter nor the December 16 letter contained a Notice of Appeals Rights section.

CLCM filed a petition for judicial review in the circuit court. CLCM's petition challenged the two letters as the DNR's final decision to apply the PSD designation to its facility. The DNR filed a motion to dismiss arguing that the December letters were not final agency decisions subject to judicial review. The DNR also argued that the PSD designation had been made in the June 2018 letter, for which the time file a petition for review had expired. The circuit court granted the DNR's motion to dismiss and denied CLCM's motion for reconsideration. The Court of Appeals affirmed.

Container Life Cycle Management, LLC filed a petition for review raising four issues:

1. Is "finality," a word that appears nowhere in Wis. Stat. § 227.52, a required characteristic of an agency decision that is the subject of a petition for judicial review under that statute?
2. When an agency such as the DNR makes a determination that has the effect of subjecting a person to a more rigorous and expensive regulatory regime and substantially increasing the cost and delay that person will encounter in seeking a permit, is that determination subject to immediate judicial under Wis. Stat. § 227.52?
3. When the DNR declared in its December 14 letter that it had "determined that [a synthetic minor] permitting approach is not approvable in an after-the-fact PSD situation" but indicated that it would consider a synthetic minor cap after CLCM completed the costly and time-consuming PSD permitting process, did that decision adversely affect CLCM's substantial interests?
4. Was CLCM precluded by an earlier decision by the DNR in June of 2018, denying a different permitting request, from obtaining judicial review of the DNR's December 14 determinations on the PSD major source and synthetic minor issues? Put another way, does issue preclusion apply in different permit proceedings subject to chapter 227?

WISCONSIN SUPREME COURT
April 6, 2022
10:45 a.m.

2020AP307 Gregory M. Backus v. Waukesha County

The Wisconsin Court of Appeals, District II (headquartered in Waukesha), certified a question to this court regarding whether a temporary limited easement is compensable under Wis. Stat. § 32.09(6b), in light of this court's decision in 118th St. Kenosha LLC v. DOT, 2014 WI 125.

In July 2016, Waukesha County acquired a Temporary Limited Easement (TLE) over .032 acres at the rear of Gregory Backus's property so that it could perform reconstruction of County Trunk Highway TT as a part of the "Waukesha West Bypass Project". This project covers five miles of roadway in both urban and rural sections of Waukesha County. It required the relocation and expansion of Highway TT and the creation of a new roadway to connect the bypass to Highway 59. Actual construction on the project began in 2018.

Backus's property backs up to county land that contains Highway TT. Backus's property, however, did not have any access to Highway TT. The section of Highway TT that is located at Backus's property is a part of the bypass and therefore part of the construction. All of the newly constructed highway was to be built on land owned by the county, and therefore, Waukesha County acquired a TLE at the rear of the Backus property. The County did not permanently take any of Backus's property. The boundaries for the property remain the same. The TLE was acquired from Backus so that the roadbuilders could grade and slope the rear of Backus's property to match the grade and slope of the abutting County land that contains Highway TT. Prior to the project, the back of Backus's property was flat, and after completion it was sloped.

On December 10, 2019, the County recorded a Release of Temporary Limited Easement with the Register of Deeds. The County pointed out that it no longer holds any interest in the Backus property. The Waukesha County Condemnation Commission determined an award amount for the Backus TLE, but apparently did not include any amount for severance or proximity damages.

Backus appealed the award to the Waukesha County circuit court, Judge Michael O. Bohren, presiding. Backus argued that he should be entitled to an award for the difference between the value of his property before the project and the value after, which an expert determined to be $90,700. The County contended that Backus was not entitled to such damages and moved for summary judgment. In response, Backus filed a motion seeking to exclude the County's expert appraiser's report and testimony on legal grounds that were "largely intertwined with the summary judgment issues". The circuit court denied both the summary judgment motion and the motion to exclude the County's expert. The County filed petition for leave to file an interlocutory appeal, which the Court of Appeals granted.

The Court of Appeals certified the following question to this court:

> In light of the Wisconsin Supreme Court's decision in 118th St. Kenosha, LLC v. Department of Transportation, is a temporary limited easement compensable under Wis. Stat. § 32.09 (6g) (2019-20)?

WISCONSIN SUPREME COURT
April 7, 2022
8:30 a.m.

2019AP2095 Great Lakes Excavating, Inc. v. Dollar Tree Stores, Inc.

This is a review of a decision of the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), affirming the Milwaukee County Circuit Court order, Judge William S. Pocan presiding, granting partial summary judgment to Riverworks City Center, LLC, and Dollar Tree Stores, Inc., and a separate order dismissing Dollar Tree.

In December of 2015, Riverworks City Center, LLC (Riverworks) entered into a contract with AMCON Design and Construction Co., LLC (AMCON) to build a retail commercial building and parking lot. Before construction began, Riverworks had entered into a lease with Dollar Tree Stores, Inc. (Dollar Tree) to lease a store at the sight. Because of Dollar Tree's deadline to take occupancy of its store, the build contract required AMCON to complete the building and surrounding parking lot by July 15, 2016. AMCON did not meet the deadline in its build contract.

In October 2016, AMCON entered into a subcontract with Great Lakes Excavating, Inc., to perform specified work for the parking lot in exchange for a payment of $37,165. The subcontract was for Great Lakes to cut and remove existing asphalt, remove concrete, excavate the site to subgrade, remove wasteful material from the site, and install a small quantity of stone in identified areas. The $37,165 did not include furnishing six inches of stone for the base of the parking lot.

Soon after beginning its work, Great Lakes ran into difficulties, including poor soil of an unknown depth. Consequently, Great Lakes entered a change order for an undetermined price with AMCON for additional work to remedy the bad soil situation, including removing the bad soil, installing additional stone, and installing engineered fabric. As the work progressed, AMCON directed Great Lakes to remove an additional concrete pad and to furnish all eight inches of stone that would underlie the asphalt. Great Lakes provided two additional change orders for this work to AMCON, but did not receive signed copies back. These changes totaled an additional payment of $185,073 bringing the total to $222,238 to be paid to Great Lakes. Great Lakes finished all of the required work by the end of November 2016. After the asphalt contractor paved the parking lot, Dollar Tree took occupancy of its leased store.

AMCON failed to pay Great Lakes' invoices. Duwayne L. Bruckner, the owner of Great Lakes, went to AMCON's offices to attempt to collect the amount due. Bruckner met with AMCON's president, John Burkemper, and his assistant Michelle Buehl. Burkemper told Bruckner that the most AMCON could pay was $33,448, which was the $37,165 original contract amount less a 10% retainage. Burkemper and Buehl indicated that Bruckner would need to sign a lien waiver form entitled "Waiver of Lien to Date." Bruckner told Burkemper and Buehl that he would not waive all of Great Lakes' lien rights, but that he would agree to a partial waiver for the amount of the $33,448 payment that he was receiving. Bruckner crossed out the words "to date" on the waiver form and initialed that change. He said he discussed the partial waiver form with Burkemper and Buehl and neither objected to a partial waiver and keeping a lien in place for the remaining $188,790 owed. Bruckner said that after the partial payment and the execution of the lien waiver, AMCON did not make any more payments on the remaining balance.

Representatives of both Riverworks and AMCON met with Bruckner to discuss the balance due. Riverworks was unable to obtain more money from its lenders, but proposed they would pay in small

installments over time. Bruckner rejected the offer saying it would take too long to receive the balance due. Bruckner said that at no time during that meeting did Riverworks' executive director, Darryl Johnson, state or imply that Great Lakes had waived its lien rights against the property.

Great Lakes filed a summons and complaint in circuit court against Riverworks, AMCON, and Dollar Tree. Great Lakes sought a money judgment for AMCON's breach of contract and to foreclose its lien against Riverworks. Riverworks filed a motion for summary judgment, arguing Great Lakes had waived its lien rights because it did not expressly limit the waiver to a particular portion of work pursuant to the procedure set forth in Wis. Stat. § 779.05(1) (Dollar Tree joined in Riverworks' motion.) Riverworks contended that the handwritten edits of "partial" and "furnished to date" did not expressly limit the waiver because the text of the waiver said that all lien rights would be waived at the time of the waiver. Great Lakes argued that Riverworks' reliance on the plain language of the lien waiver ignored the word "partial" which was not ambiguous. It also asserted that Riverworks was equitably estopped from claiming that the waiver was a full waiver of Great Lakes' lien rights, given Bruckner's averments about his communications with AMCON and Riverworks.

The circuit court agreed with Riverworks that the lien waiver executed by Bruckner constituted a full waiver under the statute and granted the motion for partial summary judgment. The circuit court did not address Great Lake's estoppel argument. Great Lakes petitioned the Court of Appeals requesting interlocutory review, which the Court of Appeals denied.

Great Lakes then stipulated with Dollar Tree for the entry of an order dismissing Dollar Tree on the merits, subject to Great Lakes reserving its right to appeal the circuit court's dismissal of its construction lien claim. The circuit court entered the order dismissing Dollar Tree and Great Lakes filed a notice of appeal from that order and the order granting partial summary judgment.

The Court of Appeals affirmed the circuit court's dismissal of Great Lakes' construction lien foreclosure claim, concluding that the intent of the handwritten changes was irrelevant as the text of the lien was clear.

Great Lakes Excavating, Inc. filed a petition for review raising three issues:

1. Does Wis. Stat. § 779.05(1), relating to the waivers of construction liens, prohibit the consideration of extrinsic evidence to give effect to the written language used by parties?
2. Can equitable estoppel be asserted to counter the argument that a lien waiver intended to be a partial lien waiver must be regarded as a full lien waiver pursuant to Wis. Stat. § 779.05(1)?
3. What must a party do to preserve an appeal when asserting equitable estoppel to oppose a defense?

WISCONSIN SUPREME COURT
April 12, 2022
8:30 a.m.

2020AP1032 John Doe 1 v. Madison Metro School District

This is a review of a decision of the Wisconsin Court of Appeals, District IV (headquartered in Madison), affirming the Dane County Circuit Court's interlocutory order, Judge Frank D. Remington presiding, denying plaintiffs' request to proceed with their lawsuit anonymously, but allowing them to file an amended complaint with their identifying information under seal that would be subject to review only by the court and counsel for the parties.

The subject of this case is a document adopted by the Madison Metropolitan School District (MMSD) in April 2018 entitled, "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" ("the Policy"). Under the Policy, MMSD allows children of any age to change their gender identity at school by selecting an "affirmed name and pronoun" to be used at school "regardless of parent/guardian permission." Parental/guardian consent is required before students may change their name and listed gender in official school records. If a student selects a new name and pronoun, the Policy requires that name and pronoun be used by all teachers and district staff.

The petitioners, who are certain parents of children enrolled in schools that are part of the MMSD, sued MMSD over the Policy in February of 2020, alleging that the Policy violated their constitutional rights to direct the upbringing of their children, including their right to raise their children in accordance with their religious beliefs and to choose a treatment approach for any child who experiences gender dysphoria. The complaint refers to the parents as John and Jane Does (with a number identifier). Accompanying their complaint, the parents filed a motion asking the circuit court to allow them to proceed anonymously in this fashion, asserting they wish to protect themselves and their children "from likely harassment and other injury." The circuit court denied the parents' motion to proceed anonymously in part. The court required the parents to disclose their identities to the court and to the attorneys for the MMSD, but ruled that the identities would remain sealed and therefore protected from public disclosure. Therefore, if the parents wished to proceed with the action, they must file an amended complaint stating their identities, which would be filed under seal.

The parents appealed the circuit court's order. The Court of Appeals affirmed, concluding that the parents failed to show that the circuit court erroneously exercised its discretion.

The following issues are presented for review:

1) May plaintiffs in Wisconsin courts use pseudonyms in appropriate cases, and if so, when and how? Did the lower courts erroneously deny the petitioners' anonymity request?
2) Whether the lower court err by declining to enjoin a significant violation of constitutional rights without consideration petitioners' likelihood of success or properly weighing the serious harms petitioners identified.

WISCONSIN SUPREME COURT
April 12, 2022
10:45 a.m.

2021AP463 Colectivo Coffee Roasters, Inc. v. Society Insurance

This case is before the court on a petition to bypass the Wisconsin Court of Appeals, District I (headquartered in Milwaukee), seeking Supreme Court review of an order of the Milwaukee County Circuit Court, Judge Laura Gramling Perez, presiding, denying Society Insurance's motion to dismiss.

A variety of Milwaukee-area businesses, including Colectivo Coffee Roasters, Inc., (collectively "Colectivo") filed a summons and complaint against Society Insurance regarding the issue of insurance coverage for business interruption during the COVID-19 pandemic. Society Insurance filed a motion to dismiss the complaint. The circuit court ordered briefing and then held a hearing on the motion, after which the court denied Society's motion to dismiss, permitting the lawsuit to continue.

Society Insurance filed with the Court of Appeals a petition for leave to appeal the circuit court's non-final order, which the Court of Appeals granted. After briefing was completed in the Court of Appeals, Society Insurance filed a petition with this court to bypass the Court of Appeals. The Supreme Court granted that petition.

Society's petition asks this court to decide to what extent, if any, do "all risk" commercial insurance policies, without a virus exclusion, cover losses incurred by restaurants and bars due to: (1) the presence of the COVID-19 virus on premises; and/or (2) government orders that limited the operation of businesses in response to the COVID-19 pandemic? The sub-issues that underlie this question include:

- Given that business interruption coverage is triggered by the insured suffering "physical loss or damage", is the presence of COVID-19 particles on the premises—circulating in the air and resting on surfaces—a form of "physical damage" that triggers coverage?'
- Or is it that COVID-19 damages people, not property, and thus the particles presence does not trigger coverage?
- Are physical alterations that restaurant and bar owners made to their spaces in response to government COVID orders – closing or limiting dining rooms, blocking off areas, altering layouts, etc. – a form of covered "physical loss" because portions of the restaurants and bars were rendered non-functional?

Society Insurance raises five issues:

1. The Society policy issued to Colectivo provides Business Income and Extra Expense coverage when there is a "direct physical loss of or damage to" covered property. When Colectivo limited its operations in response to COVID-19 and the social distancing orders, did it experience a "direct physical loss or damage to" covered property?
2. The Society policy provides Civil Authority coverage when the government prohibits access to Covered Property because of damage to other property. When Colectivo limited its operations in response to social

distancing orders, was access to its property "prohibited" because of damage to other property?

3. The Society policy provides Contamination coverage when there is a contamination on Covered Property, resulting in action by a governmental authority that prohibits access to the Covered Property. When Colectivo limited its operations because of social distancing orders and the suspected presence of COVID-19 was there a "contamination" that resulted in action by the government to prohibit access to Covered Property or production of its product?
4. The Society policy excludes coverage for "Consequential Losses", defined as "delay, loss pf use or loss of market." Does the "Consequential Losses" exclusion bar coverage for Colectivo's alleged losses resulting from COVID-19 or the governmental closure orders?
5. The Society policy excludes coverage for "Acts or Decisions" defined as "acts or decisions, including the failure to act or decide, of any person, group organization, or governmental body." Does "Acts or Decisions" exclusion bar coverage for Colectivo's alleged losses resulting from the governmental closure orders?

WISCONSIN SUPREME COURT
April 13, 2022
8:30 a.m.

2022AP91 Richard Teigen v. Wisconsin Elections Commission

This case is before the Wisconsin Supreme Court on a petition to bypass the District IV Wisconsin Court of Appeals (headquartered in Madison). Respondents, Wisconsin Elections Commission, Democratic Senate Campaign Committee, Disability Rights Wisconsin, League of Women Voters of Wisconsin, and Wisconsin Faith Voices for Justice, appealed an order of the Waukesha County Circuit Court, Judge Michael O. Bohren, presiding, granting summary judgment to Richard Teigen and Richard Thom, and permanently enjoining the Wisconsin Elections Commission from issuing election-related guidance that the circuit court ruled conflicts with Wisconsin law. Petitioners Teigen and Thom successfully filed a petition to bypass the Court of Appeals.

This case was initiated in Waukesha County circuit court on June 28, 2021, by two Wisconsin voters, Richard Teigen and Richard Thom (Petitioners), who challenge guidance issued by the Wisconsin Elections Commission (the Commission) on March 31, 2020, and August 19, 2020, pertaining to whether drop-boxes for the collection of absentee ballots are permitted, whether electors are required to personally mail or deliver their absentee ballots, and other matters. Petitioners sought a declaration that the challenged Commission guidance is contrary to Wisconsin law, specifically, Wis. Stat. §§ 6.87 and 6.855, as well as an injunction requiring the Commission to cease issuing such guidance. The following interest groups were granted permission to intervene in the action as defendants: Democratic Senate Campaign Committee, Disability Rights Wisconsin, League of Women Voters of Wisconsin, and Wisconsin Faith Voices for Justice.

On January 13, 2022, the circuit court, Judge Michael Bohren, presiding, conducted a hearing and issued an oral ruling granting summary judgment to the Petitioners and denying the defendants' request for summary judgment. The circuit court declared that the Commission's guidance on these matters was contrary to Wisconsin law and that the guidance documents constituted administrative rules under Chapter 227, which were invalid because they were not duly promulgated as rules. The court directed the Commission to withdraw the disputed guidance and to advise municipal clerks, no later than January 27, 2022, that the guidance had been declared invalid. The court then permanently enjoined the Commission from issuing future guidance conflicting with Wis. Stat. §§ 6.87 and 6.855. A written order incorporating this oral decision was entered on January 20, 2022.

The defendants filed a motion asking the circuit court to stay its order pending appeal. The circuit court issued an oral decision on January 21, 2022, denying the motion for a stay pending appeal and, sua sponte, shortening the Commission's compliance deadline to the next business day, January 24, 2022. A short written order was entered on January 24, 2022, incorporating the circuit court's oral ruling.

The defendants appealed and moved for emergency relief pending appeal. On January 24, 2022, the Court of Appeals granted the requested relief and stayed the circuit court's order through February 15, 2022. Petitioners filed in the supreme court an emergency motion to vacate the Court of Appeals' stay order, as well as an emergency petition to bypass the Court of Appeals. The supreme court declined to vacate the Court of Appeals' stay order, but granted the petition for bypass. Pursuant to the Court of Appeals January 24, 2022 order, the stay expired on February 16 and is no longer in effect. As this case comes before the court on a bypass petition there is no underlying Court of Appeals' decision for this court to review. The court is expected to consider a number of interrelated issues:

First, are there procedural impediments to this court's review, such as standing? Several defendants argue that the doctrine of sovereign immunity bars this suit, given that Teigen and Thom did not first file their complaint with the Wisconsin Elections Commission as the defendants allege is required by Wis. Stat. ch. 5.

If the case is properly before the court, are the challenged Commission memos invalid because they should have been promulgated through the administrative rulemaking process?

Do the challenged Commission memoranda provide correct guidance to municipal clerks that they may establish secure drop box locations for the return of absentee ballots? Stated differently, whether the Commission's guidance that municipalities can install drop boxes in any location, including "libraries," "businesses," "grocery stores," and "banks," is permissible under Wis. Stat. § 6.855? Must drop boxes, to the extent they are otherwise permissible, always be "staffed" by the clerk or the clerk's authorized representatives?

Does a March 31, 2020, Commission memorandum addressing Wis. Stat. § 6.87(4)(b)1, provide correct guidance to municipal clerks that a completed absentee ballot may be placed in the mail or personally returned to the municipal clerk by a family member or another person acting on behalf of the elector? Stated differently, does Wisconsin law prohibit eligible Wisconsin voters from receiving assistance in returning completed absentee ballots?